No. 17-494

# In The Supreme Court of the United States

SOUTH DAKOTA,

*Petitioner,*

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.,

*Respondents.*

*On Writ of Certiorari to the Supreme Court of South Dakota*

## BRIEF OF THE NATIONAL ASSOCIATION OF CERTIFIED SERVICE PROVIDERS AND THE SOFTWARE & INFORMATION INDUSTRY ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

Ruthanne M. Deutsch
*Counsel of Record*
Hyland Hunt
DEUTSCH HUNT PLLC
300 New Jersey Ave. NW
Suite 900
Washington, DC 20001
(202) 868-6915
rdeutsch@deutschhunt.com

## QUESTION PRESENTED

Should this Court abrogate *Quill's* sales-tax-only, physical-presence requirement?

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## INTEREST OF *AMICI CURIAE*[1]

Certified Service Providers serve as trusted intermediaries, providing software solutions for the

[1] This brief is filed with the written consent of all parties through blanket letters of consent on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

real-time calculation and automated processing of sales tax for e-commerce retailers, in all States chosen by the retailer, regardless of a retailer's physical presence. Members of *Amicus* National Association of Certified Service Providers are certified by the 24 States that are signatories to the Streamlined Sales and Use Tax Agreement, and provide full services in all 50 States.

Working with state governments, Certified Service Providers provide a range of automated sales tax solutions, including cloud-based software that integrates with commonly used e-commerce platforms and customized software for bespoke websites. This software automatically calculates and collects taxes for retailers—with all local rates, tax holidays, and specific exemptions instantaneously factored-in. Certified Service Providers also work with retailers to assist in filing taxes, whether by processing returns directly, or by providing detailed returns and reports so that retailers can self-file.

The National Association of Certified Service Providers is committed to facilitating modern sales tax administration in the modern economy. NACSP was founded to advance automated sales tax collection and administration: promote the use of Certified Service Providers, certified by the States; educate the public and the retail industry about the role and benefits provided by Certified Service Providers; facilitate training, education, and research in computerized multistate sales tax compliance; and assist the States in maintaining and enforcing appropriate standards for Certified Service Providers and in obtaining and enforcing appropriate certification marks.

NACSP members include Federal Tax Authority LLC, doing business as TaxCloud, which provides cloud-based software that currently integrates with over 85 e-commerce platforms[2]; Taxometry, founded in 2013, providing a state-of-the-art software system that calculates sales tax automatically for online purchases and remits the tax to the appropriate State on behalf of retailers[3]; AccurateTax, offering an e-commerce sales tax software designed to perform real-time accurate sales tax calculations within shopping carts during the checkout process[4]; and Taxify by Sovos and Sovos Global Tax Determinations, both certified solutions provided by Sovos, a company founded in 1979 which provides comprehensive tax calculation, filing, remittance, and certificate management solutions for all business, ranging from Fortune 500 companies to small and medium enterprises.[5]

The multiple different cloud-based technology providers represented by NACSP are led by former state tax officials, experienced tax professionals, and e-commerce innovators. They provide compliance solutions for hundreds of thousands of small and mid-size business owners, as well as Fortune 500 companies.

*Amicus* Software & Information Industry Association ("SIIA") is the principal trade association

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[2] *See* https://taxcloud.net.

[3] *See* www.taxometry.com.

[4] *See* https://www.accuratetax.com.

[5] *See* https://sovos.com *and* https://taxify.co.

for the software and digital information industries. The 700-plus software companies, search engine providers, data and analytics firms, information service companies, and digital publishers that constitute SIIA's membership serve nearly every segment of society, including business, education, government, healthcare, and consumers. SIAA's membership includes tax software providers and countless other companies that have fueled the growth of e-commerce.

*Amici* write to provide the Court with practical information about how sales tax collection across multiple jurisdictions presently works in e-commerce, and to explain that the very technologies that allow retailers to instantaneously process payments, or calculate shipping options, also make the calculation of such sales tax straightforward for retailers to manage.

## INTRODUCTION AND SUMMARY OF ARGUMENT

In 1992, when the internet was predominantly a tool for government and scientists, not consumers; no one owned a smartphone; and e-commerce largely did not exist, the Court considered whether a State could "require an out-of-state mail-order house that has neither outlets nor sales representatives in the State to collect and pay a use tax on goods purchased for use within the State." *Quill Corp. v. North Dakota*, 504 U.S. 298, 301 (1992). Adhering to a rule announced yet more decades earlier (in 1967), the Court declined to overrule *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753 (1967), and held—as a

matter of *stare decisis*, although "contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today"—that under the dormant Commerce Clause, sellers with no physical presence in a State "are free from state-imposed duties to collect sales and use taxes." *Quill*, 504 U.S. at 311, 315, 317-18.

Underpinning these rulings was a practical concern that, in 1967, "[t]he many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle [retailers'] interstate business in a virtual welter of complicated obligations in local jurisdictions." *Bellas Hess*, 386 U.S. at 759-760. And when *Quill* left the *Bellas Hess* ruling intact in 1992, the Court again expressed concern about those administrative burdens, 504 U.S. at 313 n.6 (citation omitted).

But the world has changed. Although state tax regulations might have placed "[u]ndue burdens on interstate commerce" in 1967, thereby violating the dormant Commerce Clause, *see Quill*, 504 U.S. at 314-315, out-of-state retailers do not live in the same world as in 1967, when *Bellas Hess* was decided, or even as in 1992, when *Quill* reaffirmed that ruling. *Quill*, decided a quarter-century ago, occurred before the first graphical browser was invented, before most homes had internet connections, and before e-commerce forever changed the retail landscape.

As Petitioner explains (Pet. Br. II.C), the *Quill* rule no longer alleviates special burdens on interstate sellers. Whatever the Court decides, it should be aware that the very technologies that have allowed the explosion of e-commerce since *Bellas Hess* and *Quill*

have also made it practically effortless for e-commerce retailers to calculate and collect sales tax in additional jurisdictions where they make sales beyond their home States. Given the often-free—and generally low-cost—automated solutions available, online sellers often can benefit when they opt to collect and remit state and local sales taxes, particularly in the streamlined States where Certified Service Providers provide no-cost automated solutions, and in States which often offer vendor discounts for prompt payments. In all events, the notion that out-of-state retailers would find it overly burdensome to keep track of every State's sales tax rules is simply no longer true.

## ARGUMENT

### A VIBRANT MARKET PROVIDES REMOTE RETAILERS WITH AN ARRAY OF EASY AND AFFORDABLE SOFTWARE OPTIONS FOR AUTOMATICALLY CALCULATING AND REMITTING SALES TAX.

To assist in "evaluation of the actual burdens imposed by particular regulations or taxes," *Quill*, 504 U.S. at 314-315, *amici* write to inform the Court of the many changes in technology and the marketplace that make it substantially easier for online retailers to collect sales and use tax in multiple—even thousands—of jurisdictions. Simply put: no retailer needs to manually calculate or file sales tax, or to keep track of the peculiarities in any jurisdiction's tax laws. Software that integrates easily within an online store can do it, on an automated, real-time basis (just as software instantaneously processes credit card

payments or calculates multiple shipping options). Retailers can opt for tax software solutions that automate the filing of tax returns and remittance of tax as well, or choose to download automatically generated, fully complete tax returns to self-file.

Retailers can choose from a wide array of market options for such software tools, ranging from low cost—or even for free, if they choose to file in all of the streamlined States (in which case the streamlined States cover the cost of the software)—applications that integrate with e-commerce shopping platforms, to affordable enterprise software solutions that are tailor-made to fit the needs of larger companies with bespoke platforms. And—in the case of Certified Service Providers—using such software absolves the retailers of the risk of calculation errors in the certifying States.

### A. Modern Software Tools Make It Just as Easy—or Easier—for Internet Retailers to Collect Sales Tax as It Is for Them to Calculate Shipping or Process Payments.

Today, 51 years after *Bellas Hess* and 26 years after *Quill*, online retailers easily manage hundreds of millions of items for sale throughout the nation at any given moment, instantaneously meeting consumers' demands, processing payments, arranging for delivery, and calculating shipping costs. The same software and computing advances that have made it possible for a consumer to click once in an app on her smartphone and have a pair of running shoes charged

to her credit card and delivered to her door in two days have made it just as easy, if not easier, for the shoe store to collect and remit the sales tax on that transaction, no matter where the consumer lives in the United States or where that store is located.

### 1. Advances in E-Commerce Technology Since *Quill*

By one estimate, in 1999 it cost about $100,000 to build an online storefront—apart from the physical merchandise costs. Today, a retailer can set up an online store for less than $30 per month, and can do so over a weekend. Chris Apollo Lynn, *Ecommerce Trends: What the history of selling online means to your store today*, Bigcommerce Blog (Sept. 15, 2014).[6] A brief overview of the history of e-commerce and accompanying technological advances shows why it has become so easy for retailers to market their goods online, including completing routine tasks like collecting sales tax.

Before *Quill* was decided, in the 1980s, retailers (including those engaging in mail-order or other remote sales) used software applications described as "walled gardens." *See, e.g.*, James Fields, *Business applications outgrow 'walled gardens'*, TENNESSEAN, Sept. 15, 2013. These software applications, such as inventory-management, invoicing, or accounting programs, were installed locally on the retailer's own computers, and each system operated as a closed ecosystem siloed from other datasets and applications. *See id.* Sharing information between software

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[6] *Available at* https://goo.gl/aXhP6q.

programs or between businesses required teams of computer programmers and/or expensive services that were out of reach for most small and medium-sized businesses. *Id.*; Michael Carroll, *Business-to-business e-commerce*, WEB TECHNIQUES, Nov. 1998, at 46.

Software for calculating sales tax was similarly closed-off from other systems. Data files listing tax rates were available in the market (on paper or tape) beginning in the 1970s, and a sales tax calculation program was launched in 1989, but there was no easy method to integrate sales tax software with any other system (like invoicing), nor to obtain updates to sales tax-related data. Diane L. Yetter & Joe Crosby, *No Excuses: Automation Advances Make Sales Tax Collection Easier for Everyone*, 85 STATE TAX NOTES 571, 574-575 (Aug. 7, 2017).

Fast forward to 1994 (two years after *Quill*), when a man in Philadelphia purchased an album by Sting from Noteworthy Music, a store based in Nashua, New Hampshire. Peter H. Lewis, *Attention Shoppers: Internet Is Open*, N.Y. TIMES, Aug. 12, 1994.[7] This transaction was the first to use technology that enabled the secure (encrypted) transmission of payment information over the internet. *Id.* The era of interactive e-commerce had begun. *See* Sung-Chi Chu et al., *Evolution of e-commerce Web sites: A conceptual framework and a longitudinal study*, 44 INFO. & MGMT. 154, 158 (2007) (describing the "Interactive Web era" in e-commerce).

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[7] *Available at* https://goo.gl/fkx1qJ.

Despite having the capacity to make sales to consumers through the internet, retailers' back-office functions—including sales tax calculation—were still largely conducted using software programs installed on a retailer's own computers, and the software for different back-office functions was not easily integrated. *See* Yetter & Crosby, *supra*, at 575. What's more, setting up an online storefront required creating a bespoke system from the ground up, demanding significant programming skills or funds—recall the $100,000 estimate from 1999. Lynn, *Ecommerce Trends*, *supra*.

The 2000s, however, brought a significant advance, in the form of user-friendly, web-based software that retailers could use to set up and run online stores (including managing inventory, shipping, payments, etc.), without technical skills or teams of software developers. *See* Yetter & Crosby, *supra*, at 576. Web-based (or "cloud") software is hosted on the servers of a service provider, enabling multiple users to share the costs of developing, maintaining, and operating the software and reducing the up-front investment required from the user. *See* Software & Info. Industry Ass'n, *Software as a Service: Strategic Backgrounder* (Feb. 2001), at 9-11.[8]

The transformation of the internet from "a medium for publishing information" to "a distributed operating system that could deliver software services" rests in large part on an innovation known as application programming interfaces or "API"s. *See*

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[8] *Available at* https://goo.gl/jV3L9F.

Anne Helmond, *The Platformization of the Web: Making Web Data Platform Ready*, SOC. MEDIA & SOC'Y, Jul.-Dec. 2015, at 3-4 (2017).[9] An API allows one software platform to share data with other applications, operating as "the gate[] in the walled garden." Ryan Holmes, *From Inside Walled Gardens, Social Networks Are Suffocating The Internet As We Know It*, Fast Company, Aug. 9, 2013[10]; Seth Benzell et al., *The Impact of APIs on Firm Performance*, Boston University Questrom School of Business Research Paper No. 2843326, at 3 (May 21, 2017).[11] For example, a retailer that has brick-and-mortar stores might want to display maps of its locations and provide users the ability to generate driving directions. Rather than developing its own mapping software and database, the retailer could use the Google Maps API for that purpose. *See* Holmes, *supra*.

There are now over 10,000 APIs offered in the marketplace, up from only a few hundred in 2005. Benzell, *supra*, at 4. For e-commerce retailers, that means there's an API (or, more likely, several choices of API) for every function necessary to run an online store. Need to process payments? There are many APIs for that. Manage shipping? Ditto. Automatically populate your online store with information about the products you carry? Another API. *See* Mark Boyd, *10 Ways Your eCommerce*

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[9] *Available at* https://goo.gl/hQ5B1V.

[10] *Available at* https://goo.gl/pMFbyR.

[11] *Available at* https://goo.gl/W8octY.

*Businesses Can Use APIs*, eCommerce Insiders, Aug. 30, 2017.[12]

Retailers can also take advantage of pre-built cloud-based e-commerce platforms that integrate with large numbers of APIs, providing a ready-made packaged solution that allows an online retailer to easily manage shopping carts, checkout, payment, shipping, and everything in between—including sales tax calculation—in a plug-and-play fashion by simply selecting particular service providers for those functions. *See, e.g.*, BigCommerce, Search Apps and Extensions (listing hundreds of service providers that can be integrated into one e-commerce platform across fourteen categories, including shipping, payments, and accounting and tax).[13] Last year, the top ten platforms of this kind covered nearly half of the market. *Ecommerce Usage Statistics*, Built With, Feb. 2018.[14] One such platform called WooCommerce, which is free, was used by about a tenth of e-commerce sites in the United States. *Id.*

Generally, all but the very largest retailers (that have the resources and opt to develop a bespoke e-commerce system) use such platforms. *Exploring Alternative Solutions on the Internet Sales Tax Issue: Hearing Before the H. Comm. on Judiciary*, 113th Cong., at 2-3 (Mar. 12, 2014) (statement of R. David L.

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[12] *Available at* https://goo.gl/iifMAk.

[13] *Available at* https://www.bigcommerce.com/apps/.

[14] *Available at* https://trends.builtwith.com/shop.

Campbell, CEO of TaxCloud).[15] Because of these platforms and APIs, tasks that used to require a substantial investment in hardware, software, and personnel with computer skills have now become tasks that a single shop owner with basic internet skills can complete in a few hours with a few clicks.

**2. Modern Sales Tax Automation**

These same advances in cloud computing and web-based software have made it very easy for online retailers to calculate, collect, and remit sales tax in multiple jurisdictions. This may be best illustrated by imagining yourself as an online retailer, following the steps you would likely take to start collecting sales tax in your home State, or possibly multiple States.

The process has four basic steps: (1) fill out some basic information about the business, (2) choose the States in which to collect tax, (3) connect the tax software to your e-commerce platform, and (4) tag your products with category labels. Whether you sell in one State or in many, the steps are identical (and only need be done once for each type of item sold). Every retailer tags products anyway, and after the tagged products are linked with tax software (which will likely need to be done for the State in which you have physical nexus) all it takes to collect and remit tax in additional States is the click of a button.

After this one-time set-up, everything else, from calculating and collecting sales tax on each

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[15] *Available at* https://taxcloud.files.wordpress.com/2014/03/fedtax-judiciary-committee-statement-031214.pdf.

transaction, to filing returns is (or can be) accomplished by the software automatically.

Imagine you have just set up an online clothing store using an e-commerce platform, featuring accessories and T-shirts with witty sayings. You know you need to collect sales tax in at least your home State, so you go to the website of a sales tax software provider and register by filling out some basic information, like your business name and website. Step one is done.

Next, you choose the locations where you want to collect sales tax. This may involve clicking on a map or clicking on a State name from a list. You may also be asked to enter addresses where you have physical locations, which will automatically turn tax collection on in those States. If you wish to have the software file tax returns for you, you simply need to provide your sales tax license number and bank account information. To see a video of this process, visit https://go.nacsp.tax/states (showing software from NACSP member TaxCloud). Step two is done.[16]

Step three is to link your sales tax software with your online store. This may require installing a software "plug-in" or entering login or API credentials. To see a video of this process with NACSP member

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[16] Your sales tax license number must be obtained from the States, but there are some automated options for that in some States, as well. For example, for Certified Service Providers, you may have the option to turn on all of the streamlined States in one click. And if you have opted to collect tax in all of the streamlined States, you need register for a license only once for all of the States, and a CSP will complete the registration for you. *See* https://goo.gl/2s32w2.

AccurateTax, visit https://go.nacsp.tax/plugin, and to see a video using Taxify, from NACSP member Sovos, visit https://go.nacsp.tax/ecommerce. This is the same basic process a retailer uses to install a payment processing plug-in to accept credit cards, or a shipping plug-in. The latter, which any online retailer that ships physical merchandise is likely to do, can be substantially more complicated and require many more advanced settings, like how to handle difficult-to-pack items and multiple different shipping options. *See, e.g.*, WooCommerce UPS Shipping Plugin Setup Guide.[17] For the more straightforward tax plug-in, the whole process has taken less than 10 minutes thus far, and you're nearly done.

Your next (and final) step is to tag the products in your online store so the software can assign Taxability Information Codes. *See, e.g.*, TaxCloud, Taxability Information Codes.[18] Each category of items that is treated differently by some jurisdiction in the United States has its own code. The software is provided by a team of tax professionals who continually update the programs to keep abreast of changing tax codes, and in the case of Certified Service Providers, those updates are certified by participating States. And the software, not the retailer, does the work of keeping track of whether an item is taxable or not in any particular jurisdiction. All the seller needs to know is what they sell. Videos showing how this

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[17] https://www.youtube.com/watch?v=Yyb7aNkgMZ4.

[18] *Available at* https://taxcloud.com/tic/.

works can be seen at https://go.nacsp.tax/find_tic and https://go.nacsp.tax/set_tic.

Accordingly, all you need to do is assign your items to well-described categories, by scanning the list of categories provided in drop-down menus. For example, you would quickly see that your T-shirts fall into the general "clothing" category and do not meet any of the specialty clothing categories, so you tag all of your T-shirts as "clothing" by clicking a box.

You then work through the rest of your items. When you get to the belts that you sell, you see an entry for belt buckles, which informs you that belt-and-buckle combinations sold together should be assigned the "clothing accessories" code, whereas belt buckles sold independently of any belt should be assigned a distinct "belt buckle" code. *Id.* You categorize your belts and buckles accordingly. You are now done, and your e-commerce store will calculate and collect sales taxes in as many jurisdictions across the United States as you choose.[19]

Time spent tagging your inventory varies based on how many different types of things you sell, but is typically done only once for any item, and it has to be done for all of your items, anyway, to collect sales tax in your home State. The process is also made easier by the fact that you already categorize your T-shirts and other items so that customers can browse by

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[19] For larger e-commerce sellers with varying inventories, the process might be more complex, and Certified Service Providers like Sovos provide software solutions and tailored services to assist businesses in managing this process.

category in your online store, allowing you to tag entire categories at once. And after all your merchandise is tagged and categorized, the software works automatically to calculate the correct amount of tax from any jurisdiction, in a way that is completely seamless to you and your customers. You don't need to know, for example, that belt buckles have their own Taxability Information Code because belt buckles are taxed differently in Texas than belts. *See* Jessica Adamiak, *America's Strangest Taxes*, Travel & Leisure (Apr. 17, 2013).[20] As an e-commerce operator, all you need to know is that the drop-down menu asked you to tag that item separately, and the software takes care of the rest.

Exemptions can also be handled without retailers needing to know the differing rules for exemptions in various States. Many software options can determine which buyers are tax-exempt in which States by automatically asking for (and checking) tax-exemption certificates for the most common exemptions as part of the sales transaction process (so long as you enable that option). A video displaying this can be viewed at https://go.nacsp.tax/exempt. Allowing the software to use exemption certificates to process exemptions means you, as the retailer, don't need to know either "remote and uncertain" facts about your buyers, *Bellas*

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[20] *Available at* https://goo.gl/RBaevt. If you are aware, however, of an item-specific tax or exemption in a jurisdiction you do business in, and don't see that item singled out in the drop-down menu, you can contact the software provider, who will verify the information and modify the software accordingly, benefiting all users.

*Hess*, 386 U.S. at 759 n.14, or the categories of buyers that are tax-exempt in a particular State.

Likewise, you don't need to know when any particular jurisdiction has a tax holiday; the software provider keeps track of tax holidays, and any changes to those dates, and it calculates no tax on sales going to that jurisdiction on those days. The same goes for special rules that govern specific items, such as price thresholds. For example, some clothing below a certain price is not taxed in New York, even though clothing is generally a taxable category. *See* N.Y. State Dep't of Tax'n & Fin., Publication 718-C, Sales and Use Tax Rates On Clothing and Footwear (effective Dec. 1, 2015).[21] The merchant need not track what the taxability threshold is, or changes to that rule. The software provider will know when an item is under the threshold (and calculate no tax accordingly) and will update its systems with any rule changes. These updates—whether for tax holidays or tax thresholds or any other type of rule—will propagate immediately for the benefit of all merchants.

Here's how it works: at various points in the sales transaction (when the buyer clicks "checkout" or "buy," for example), an e-commerce website will automatically send requests with information (known as "calls") to the sales tax software API and then receive information back (like the amount of tax). The sales tax software uses the information the website is already collecting (shipping address, product type, quantity and price of items purchased) to accurately

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[21] *Available at* https://goo.gl/KgbPYc.

calculate sales tax. And, for Certified Service Providers, the software is certified on an ongoing basis by the streamlined States, and retailers face no audit risk in the certified States from erroneous calculations. *See infra* at 24. To view a video of this with one software option, visit https://go.nacsp.tax/transaction. All of these software processes happen automatically, without any action by the retailer or customer, other than the actions necessary to make a purchase, such as entering a shipping address and clicking "buy."

Because the software is automatically calculating sales tax and logging each transaction as it is completed, the process of filing sales tax returns is largely automated as well. An e-commerce retailer can choose to have a service provider automatically file the return and remit the tax in any State. And where automated filing service is not available, or a retailer chooses not to use it, the software will generate the forms that need to be filed with all required information; all a retailer need do is submit them along with the tax. Adding additional States—even all of them—simply means that more automated reports are generated by the software, with no additional time required to set up the system or maintain records.

The use of user-friendly drop-down menus through the point-and-click process described above applies for online retailers using common e-commerce platforms. But the same automated calculation and record-keeping for sales tax collection can be delivered in different ways for different types of retailers. For customized online stores, built and run using unique software rather than e-commerce platforms, sales tax

service providers make it easy for developers to integrate their APIs by providing free, ready-made blocks of software source code in a variety of programming languages that can be cut-and-paste into an e-commerce site. *See, e.g.*, TaxCloud Developer Center. [22] As custom-built online storefronts are ordinarily created by developers or tech-savvy owners, integrating this sort of ready-made code is a straightforward task.

And beyond the web-hosted solutions, there remain many robust "on-premises" software options for businesses to choose from that provide as much or as little automation as the client chooses. For example, in addition to fully cloud-based offerings, NACSP member Sovos offers calculation software that can be installed locally and paired with a return-filing service or return-filing software, at the retailer's option, as well as a number of other combinations of services with hosted or on-premises software. *See also* Yetter & Crosby, *supra*, at 576.

Whether hosted online or at a retailer's location, the central premise of sales tax calculation software remains the same: it keeps track of every jurisdiction's rates and taxability classifications (including local tax holidays and jurisdiction-specific exemptions); it automatically calculates the sales tax owed based on information that the online seller already collects to complete every transaction (item sold and where it goes to); and it keeps the records and prepares the relevant returns.

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[22] *Available at* https://dev.taxcloud.com/.

And all of this is continuously updated to respond to changing sales tax laws. *See, e.g.*, TaxCloud Developer Center, Getting Oriented With TaxCloud (describing automatically updated "feeds" that TaxCloud provides for tax categories so that an online store is automatically updated with the most current taxability information). [23] Sales tax software providers monitor changing state laws (and respond to user questions, as described above) so that online retailers do not have to do that work. *See* Taxify by Sovos: Features (describing 20 tax attorneys on staff for this purpose). [24] And with Certified Service Providers, the accuracy of these taxability determinations is continually certified by the States, so that retailers who accurately tag their inventory bear no risk of getting it wrong in the certifying States. *See* p. 24, *infra*.

With these automated tools available, it is no more burdensome to collect and remit tax in 50 (or 50,000) jurisdictions than it is to collect and remit sales tax to your home State—and easier, in fact, than handling shipping to all those disparate locations, where variations in fragility or perishability of product, and changing weather conditions, can further complicate the capacity to provide real-time calculations. Tens of thousands of e-commerce merchants are using software from Certified Software Providers, including nearly four thousand sellers that

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[23] *Available at* https://dev.taxcloud.com/guides/getting-oriented-with-taxcloud.

[24] *Available at* https://taxify.co/features/.

have voluntarily registered to collect taxes in all of the streamlined States regardless of physical nexus, *see* Streamlined Sales Tax Governing Board, Total Active Registered Accounts.[25] This widespread adoption of sales tax software demonstrates how easy it is for retailers to calculate and remit sales tax in many jurisdictions. Together, and considering only the cloud-based options, software provided by Certified Service Providers calculated sales tax for more than 600 million transactions in 2017, representing more than $25 billion in online sales—and more than $2 billion in sales tax revenue to state governments.

### B. Automated Sales Tax Collection and Administration Software Is Not Costly and Provides Important Benefits to Retailers

Technological developments have not only made it easy to handle sales tax collection in multiple jurisdictions, they have made it affordable. Certified Service Providers provide automated sales tax solutions in a variety of low-cost pricing models that scale up as a retailer's business does, and if e-commerce retailers volunteer to collect and remit taxes in streamlined States, they receive certified tax calculation and remittance services at no cost.

1. Because NACSP members' software and tax calculations are continually certified as accurate by the streamlined States, retailers using those services receive many benefits: free software (paid for by the States); no audit liability in certain States if there are

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[25] *Available at* https://goo.gl/rtvJJe.

any inaccuracies in the calculations made by the software; the ability to use a single identification number to file and remit taxes for certain member States; and free filing of tax returns by the Certified Services Provider.[26]

In the 24 streamlined States, retailers who collect and remit taxes receive CSP services at no cost whatsoever, as the streamlined States finance this initiative. Under Section D.1 of the CSP contract, streamlined States pay CSPs for services provided to retailers that qualify as Volunteer Sellers (meaning, in broad brush terms, that they lack physical nexus).[27]

Under sections 501 and 502 of the SSUTA, moreover, each member of the Agreement (including not only full members, but also contingent members and associate States) certifies the accuracy of the software and must provide liability relief to retailers for incorrect tax calculation based on that certification. And when retailers have Certified Service Providers file their taxes directly, CSPs assume the primary responsibility for any jurisdictional audit inquiries. *See Exploring Alternative Solutions on the Internet Sales Tax Issue: Hearing Before the H. Comm. on Judiciary*, *supra*, at

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[26] The Streamlined Sales and Use Tax Agreement ("SSUTA") may be found at https://goo.gl/ygPbB3 and is generally described in the brief of Amicus Curiae Streamlined Sales Tax Governing Board, Inc., filed in support of the Petition for Certiorari. The business immunity provisions are found in §§ 501 & 502 of the SSUTA.

[27] The CSP Contract may be found at http://tinyurl.com/CSPContract.

3-4. Retailers working with Certified Service Providers in the streamlined States thus not only receive no-cost, certified sales tax services, but also benefit from liability protections.

But not only retailers and streamlined States benefit from working with automated tax software solutions. Certified Service Providers and others provide automated solutions for the real-time collection and practically effortless remittance of sales tax in every State across the country, offering soup-to-nut services to retailers to ease any burden of tax compliance, which every State has a strong interest in securing. Beyond the States that have joined the SSUTA, the National Association of Certified Service Providers is also working with States outside of the SSUTA—including States that perhaps will never join because they want to retain their own unique tax structure—to set up similar certifications and liability protections for online retailers. Several States have expressed interest in certifying tax service providers outside of the SSUTA framework, and at least one has begun the process, recognizing the role and proficiency of Certified Service Providers in facilitating higher compliance rates and more accurate tax calculations. Such certifications will extend the benefits to retailers even further.

2. Some retailers volunteer to collect and remit taxes even when not required to do so under *Quill's* physical-nexus regime because it's inexpensive and easy to remit sales tax, and costly to get nexus wrong. The lack of certainty regarding physical-nexus rules and the high costs of non-compliance, the low-cost of tax calculation services, and prompt payment

discounts in various States, all contribute to making it easier for retailers to file in multiple jurisdictions.

Given the ever-changing definitions of what constitutes physical nexus across jurisdictions, retailers face tremendous costs and challenges to keep track of their physical activities (and depending on jurisdiction, those of their agents) across localities, and to monitor state nexus legislation, regulations, and case law. *See* Yetter & Crosby, *supra*, at 572-573; *accord* Pet. Br. II.A. The business risks associated with a nexus mistake can be "significant." Yetter & Crosby, *supra*, at 573. If collected at the time of sale, any sales tax amount should be a passthrough from the customer, not a cost to the seller. But if a seller fails to tax at time of sale, and later faces liability, the sales tax amount (on average 7 percent of sales price) will be paid directly by the seller, after the fact. And "penalties and interest on the uncollected tax can easily add another 30 percent to 40 percent to the tax bill over a three-year audit period." *Id.*

To the extent that retailers are nonetheless deciding not to collect sales tax—and gambling on being right about lacking physical nexus—it is not because of the cost of collecting and remitting sales tax, which is minimal when using software like that offered by Certified Service Providers. For retailers working with CSPs in the streamlined States, the costs of collecting sales tax are, of course, nil. And for the non-streamlined States, automated tax solutions are always affordable—often far below what retailers routinely pay for other e-commerce services—and readily tailored to the needs of diverse retailers.

Pricing models vary tremendously across service providers, including monthly flat fees and low transaction-based or sales-volume-based percentages. Pricing is often scaled to the size of the retailers' business and adjusted for the type of transaction (e.g. low-volume high-value transactions might be subject to different pricing than high-volume low-price transactions). Across the board, a retailer's out-of-pocket costs associated with automated real-time tax calculation and collection, and, if desired, automated reporting and remittance, are well within the range, if not below, other transaction costs that e-commerce retailers regularly incur when doing business, such as merchant interchange fees, or the provision of free shipping to customers.[28]

What's more, because the automated sales tax software market is vibrant and increasingly competitive, costs are continuing to decline as technology advances and new entrants join the market. As of August 2017 there were at least 33 providers of general sales and use tax automated solutions, including certified and non-certified providers, most of which are integrated with existing

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[28] Merchant interchange fees for credit card payments, described in *United States v. Am. Express Co.*, 838 F.3d 179, 188 (2d Cir. 2016), *cert. granted sub nom. Ohio v. Am. Express Co.*, 138 S. Ct. 355 (2017), vary across credit cards, and can range from 1 to 4% of transactions, *see, e.g.*, Ben Dwyer, *Average Credit Card Processing Fees*, *available at* https://goo.gl/LCmdax. For Amazon.com Marketplace retailers, transaction fees are 2.9% plus a per-transaction authorization fee. *See* https://goo.gl/Yd5jNp.

e-commerce shopping cart platforms. *See* Yetter and Crosby, *supra*, Appendix.

There is also some potential financial benefit for e-commerce retailers that routinely collect and timely remit sales tax.

Retailers that collect sales taxes in real time and promptly pay according to the varying payment schedules across jurisdictions (which Certified Service Providers track for the retailer, and make payments if authorized) can benefit from "vendor discount" laws that compensate for the costs of collecting the tax, ranging from 0.5% to 5% of tax received.[29] More than half of States provide such discounts, meaning that retailers who use software to collect taxes in real time at the moment of sale, and then promptly file, receive money in the form of a prompt-payment discount, perhaps even enough to more than cover any software costs (if there are any). That is all-the-more likely if they are a small retailer, depending on the amounts at issue and the size of the State's discount. And particularly so because, if they collect in the streamlined States, they may have little to no software costs at all.

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[29] More than half of States currently provide prompt payment or vendor discounts at varying rates, including Texas (0.5%, Tex. Tax Code Ann. § 151.423) and New York (5% up to $200 per quarter, N.Y. Tax Law, § 1137(f)). Pennsylvania's discount is 1% or $25 per return for a monthly filer; $75 per return for a quarterly filer; or $150 per return for a semiannual filer. 72 Pa. Cons. Stat. § 7227. South Dakota, too, provides a prompt payment discount of 1 1/2% of the gross amount of tax due up to $70 per month. S.D. Codified Laws § 10-45-27.2.

The bottom line is that there is little or no cost to using certified automated tax software to collect sales tax in multiple jurisdictions, particularly for smaller retailers able to make use of off-the-shelf solutions. And whatever the retailer's size or unique demands, Certified Service Providers offer affordable software solutions that, like other e-commerce tools, scale to the business needs at hand. Retailers that use such solutions not only avoid potential liability for non-collection but may sometimes even come out financially ahead. Certified Service Providers' experience as trusted intermediaries helping to facilitate the prompt and accurate collection and payment of sales tax across countless retailers and jurisdictions demonstrates that it can be easy and affordable for retailers to calculate and remit sales taxes.

## CONCLUSION

Cost-effective technology solutions are readily available that resolve the difficulty of calculating and remitting taxes across all jurisdictions.

Respectfully submitted.

Ruthanne M. Deutsch
*Counsel of Record*
Hyland Hunt
Deutsch Hunt PLLC

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